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In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN PUBLIC GAS ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

AMERADA HESS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Statutes involved	3
Questions presented	3
Statement	4
Argument	7
Conclusion	22
Appendix	1A

CITATIONS

Cases:

American Airlines, Inc. v. *Civil Aeronautics Board*, 359 F. 2d 624	17
American Public Gas Association v. *Federal Power Commission*, 498 F. 2d 718	15, 16, 17
American Smelting and Refining Co. v *Federal Power Commission*, 494 F. 2d 925, certiorari denied, 419 U.S. 882	17
City of Chicago v. *Federal Power Commission* 458 F. 2d 731, certiorari denied, 405 U.S. 1074	17
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591	21
Federal Power Commission v. *United Gas Pipe Line Co.*, 386 U.S. 236	13
Federal Power Commission v. *United Gas Pipe Line, Co.*, 393 U.S. 71	13
Ford Motor Co. v. *National Labor Relations Board*, 305 U.S. 364	10

Cases—Continued

	Page
Mobil Oil Corp. v. *Federal Power Commission*, 417 U.S. 283	7, 10
Mobil Oil Corp. v. *Federal Power Commission*, 483 F. 2d 1238	15, 16, 17
Natural Gas Pipeline Co. of America v. *Federal Power Commission*, 128 F. 2d 481	10
Permian Basin Area Rate Cases, 390 U.S. 747	7, 10
Phillips Petroleum Co. v. *Federal Power Commission*, 475 F. 2d 842, certiorari denied *sub nom Chevron Oil Co.* v. *Federal Power Commission*, 414 U.S. 1146	15
Shell Oil Co. v. *Federal Power Commission*, 520 F. 2d 1061, rehearing denied, 525 F. 2d 1261, certiorari denied, *sub nom. The California Co.* v. *Federal Power Commission*, 426 U.S. 941	5, 11, 13, 15
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742	15, 16
United States v. *Florida East Coast R. Co.*, 410 U.S. 224	15
Constitution, statutes and regulations:	
United States Constitution, Fifth Amendment	20
Administrative Procedure Act:	
5 U.S.C. 553	15, 18
5 U.S.C. 556	14, 15, 16
5 U.S.C. 557	14, 16
Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565	1
Section 401	2
Section 402(a)(1)(c)	2
Section 403(d)	16
Section 705(c)–(e)	2

Constitution, statutes, and regulations—Continued

	Page
Natural Gas Act, 52 Stat. 821, as amended	
15 U.S.C. 717, *et seq.*:	
Section 4, 15 U.S.C. 717c	3, 1A
Section 5(a), 15 U.S.C. 717d(a)	3, 15–16, 4A
Section 15, 15 U.S.C. 717n	3, 5A
Section 15(b), 15 U.S.C. 717n(b)	16, 17, 5A
Section 19(b), 15 U.S.C. 7174(b)	3, 7, 10, 15, 16, 6A
Tax Reduction Act of 1975, Section 501(a), 89 Stat. 26	11
18 C.F.R. 1.20(a)	16
18 C.F.R. 1.20(g)	16
18 C.F.R. 1.20(m)	16
Miscellaneous:	
Executive Order No. 12009, 42 Fed. Reg. 46265	1
39 Fed. Reg. 43093	5
FPC Opinion, 52 F.P.C. 1604	4, 5
FPC Opinion, 52 F.P.C. 1693	5, 18
H.R. Rep. No. 95–539, 95th Cong., 1st Sess. (1977)	16

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-595

AMERICAN PUBLIC GAS ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

No. 77-697

AMERADA HESS CORPORATIONS, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION* IN OPPOSITION

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*As of October 1, 1977, pursuant to the Department of Energy Organization Act ("DOE Act"), Pub. L. 95-91, 91 Stat. 565 (August 4, 1977), and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 13, 1977), the Federal Power Commission ceased to exist. Certain of its functions and regulatory responsibilities,

OPINIONS BELOW

The opinions of the court of appeals affirming the orders of the Federal Power Commission (Pet. No. 77-695 App. A)[1] and denying rehearing (Pet. App. B) are not yet reported. The opinions and orders of the Federal Power Commission are set forth in Part I, Volumes 1 and 2, of the Joint Appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1977, and its order denying petitions for rehearing was entered on August 17, 1977. The petition for a writ of certiorari (Pet. No. 77-695) was filed November 15, 1977, and the conditional cross-petition for a writ of certiorari (Pet. No. 77-695) was filed on November 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

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including "the establishment, review, and enforcement of rates and charges for the transportation and sale of natural gas by a producer or gatherer * * * under Sections 1, 4, 5, and 6 of the Natural Gas Act," were transferred to the Federal Energy Regulatory Commission (Section 402(a)(1)(c)), an independent regulatory commission within the Department of Energy (Section 401(a)). The "savings provisions" of Section 705(c)-(e) of the DOE Act provide for the substitution of the Federal Energy Regulatory Commission for the Federal Power Commission in pending litigation such as this case. References herein to "the Commission" refer to either the Federal Power Commission or the Federal Energy Regulatory Commission, as the context indicates.

[1] Appendix references in this brief refer to the Appendix to the Petition in No. 77-695, which is hereinafter designated simply as "Pet. App."

STATUTES INVOLVED

Sections 4, 5(a), 15, and relevant portions of Section 19(b) of the Natural Gas Act, 52 Stat. 822, 823, 829, 831, as amended, 15 U.S.C. 717c, 717d(a), 717n, and 717r(b), are set forth in an Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review in reviewing orders of the Federal Power Commission prescribing national ceiling rates for sales of "new" natural gas for resale in interstate commerce.

2. Whether the Commission's inclusion of federal income tax costs in the prescribed rates was based on rational premises supported by substantial evidence.

3. Whether the Natural Gas Act and the Administrative Procedure Act require the Commission to provide a full evidentiary hearing with oral cross-examination in ratemaking proceedings such as this one.

4. Whether the Commission's proceeding gave affected parties adequate notice of the definition of "new gas" ultimately adopted in the Commission's final order.

5. Whether the Commission's ~~properly established~~ decision to prescribe different rates for different classes, or vintages, of gas according to when wells were commenced was supported by the record.

6. Whether the Commission abused its discretion in determining certain cost components used in the rate.

STATEMENT

The petition and conditional cross-petition challenge on various grounds the decision of the court of appeals affirming orders of the Federal Power Commission that established new national rates for interstate sales of natural gas.[2] The Commission and the court of appeals addressed numerous legal and factual issues not directly raised by the petitioners or cross-petitioners here. Accordingly, in this Statement we outline only the background and salient features of the orders and decisions below. To the extent that additional facts are relevant to the issues raised in the petition or cross-petition, they are set forth in the Argument, *infra,* pp. 7–22.

In 1974 the Commission, in Opinion No. 699–H, 52 F.P.C. 1604, established for the first time a national rate for interstate sales of natural gas. That rate, 52 cents per Mcf (thousand cubic feet), applied only to "new gas," which at that time was defined as (1) gas from wells commenced after January 1, 1973; (2) gas from wells commenced before January 1, 1973, if the initial delivery of gas from those wells in interstate commerce was made after January 1, 1973; or (3) gas sold in interstate commerce under a

[2] Petitioners in No. 77–695 are the American Public Gas Association et al. ("APGA"), representing certain consumer interests. Petitioners in No. 77–697 (the conditional cross-petition) are Amerada Hess Corporation, *et al.* ("Amerada"), a group of natural gas producers whose rates for the resale of natural gas in interstate commerce are prescribed by the Commission's orders. Except where necessary to avoid confusion, references to the petitions hereinafter will not repeat the docket numbers.

contract that replaced an existing contract that expired by its terms after January 1, 1973 (52 F.P.C. 1604, 1650–1651). Other gas sold in interstate commerce continued to be governed by the Commission's previously established area rates. The national rate established by Opinion No. 699–H was upheld in *Shell Oil Co.* v. *Federal Power Commission,* 520 F. 2d 1061 (C.A. 5), rehearing denied, 525 F. 2d 1261 (C.A. 5), certiorari denied *sub nom. The California Co.* v. *Federal Power Commission,* 426 U.S. 941.

In December 1974 the Commission instituted this proceeding to establish new national rates governing sales in the 1975–1976 biennium of gas dedicated to interstate commerce after January 1, 1973.[3] The Commission did not utilize a full evidentiary hearing, but instead designated as respondents all interstate pipeline companies and large producers, provided for the submission of written comments and reply comments and supplemental reply comments from all interested parties (including the Commission staff), and made available to all parties the comments and information submitted, including two cost studies

[3] 52 F.P.C. 1693; 39 Fed. Reg. 43093. The order instituting the proceeding was supplemented by (a) orders issued June 13, 1975 (to update a prior staff study of certain offshore-Louisiana gas reserves to confirm gas reserve figures compiled by the American Gas Association) and June 16, 1975 (inviting comments concerning the weight, if any, to be given to current intrastate market prices in determining just and reasonable interstate prices); and (b) notices issued August 4, 1975, October 3, 1975, and March 23, 1976, requesting comments on various cost studies and rate recommendations submitted by the Commission staff.

by the Commission staff. After the receipt and review of extensive comments and replies submitted by forty-six parties and groups of parties, the Commission, in July 1976, issued Opinion No. 770,[4] establishing new national rates for the 1975–1976 biennium. In November 1976, after rehearing (with oral arguments), the Commission issued Opinion No. 770–A,[5] modifying somewhat the rates prescribed in Opinion No. 770.

Opinion No. 770–A established different rates for three classes, or "vintages," of gas: (1) $1.42 per Mcf (escalating 1 cent per calendar quarter) for gas from wells commenced on or after January 1, 1975; (2) $.93 per Mcf (escalating 1 cent per annum) for gas from wells commenced on or after January 1, 1973, but before January 1, 1975; and (3) $.52 per Mcf (escalating 1 cent per annum) for gas sold under "renewal contracts" which replace prior contracts expiring by their own terms (Pet. App. 10). The rates were based on cost (calculated on the basis of complex economic models and the best available information) plus a 15 percent rate of return. To the extent that the determination of specific cost elements used in the Commission's models is challenged by the petitions, these determinations are discussed in the Argument that follows.

Producers, consumers, and other groups filed petitions for judicial review raising a host of issues. In a comprehensive opinion, the court of appeals affirmed the Commission's orders (Pet. App. 1–113). Judge Fahy, concurring generally in the opinion, dissented with respect to the Commission's treatment of income tax components and of past advance payments from pipelines to producers (Pet. App. 114–129, dissenting opinion).

[4] J. A. Part I, Vol. I, 297.
[5] J. A. Part I, Vol. II, 581.

ARGUMENT

1. Petitioners American Public Gas Association, *et al.* ("APGA") contend (Pet. 14–19) that the court of appeals abandoned the substantial evidence standard of review required by Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), and by decisions of this Court. The contention is belied by the court of appeals' opinion, which repeatedly refers to and relies on the substantial evidence test and which conforms to the standards of review established by this Court in *Mobil Oil Corp.* v. *Federal Power Commission,* 417 U.S. 283, and *Permian Basin Area Rate Cases,* 390 U.S. 747.

Thus the court began by recognizing that Section 19(b) of the Act provides that the " 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive' " (Pet. App. 18), and by quoting this Court's statement in *Permian, supra,* 390 U.S. at 791–792, that a reviewing court, among other things, "must decide whether each of the order's essential elements is supported by substantial evidence" (Pet. App. 19). The court further considered the substantial evidence test as articulated by this Court in *Mobil,* and concluded (*id.* at 21):

> Throughout *Mobil* reflects an approach to the "substantial evidence" standard as requiring the reviewing court to respect the agency's wide latitude for difficult policy choices, and in adjusting that standard "in this time of acute energy shortage" to provide greater freedom for new proposals and techniques.[6]

The opinion leaves no room for doubt that the court of appeals applied the substantial evidence standard in reviewing each of the essential elements of the Commission's orders. Thus in rejecting challenges to the use of economic models employing hypothetical cost projections, the court noted (Pet. App. 36) that such methodology had been approved in *Permian* and other cases and that:

> [i]n each of these cases the key question was not the extent to which the Commission methodology consisted of empirical observations, but whether its premises were supported by substantial evidence and whether its reasoning was sound. These are the demands which are appropriately made of the Commission in this case.[7]

[6] In discussing the standard of review, the court also noted (Pet. App. 18): "Some commentators have also put it that a statutory reference to 'substantial evidence' requires a more rigorous standard of review than the arbitrary-capricious standard. We agree with Judge Friendly that the issue is largely semantic, and that the two criteria 'tend to converge' in notice-and-comment rulemaking. *Associated Industries of New York* v. *Dept. of Labor*, 487 F. 2d 342, 348–350 (2d Cir. 1973). What is basic is the requirement that there be support in the public record for what is done, *City of Chicago* v. *FPC*, 147 U.S. App. D.C. 312, 458 F. 2d 731 (1971), *cert. denied*, 405 U.S. 1074 (1972)." (Footnote omitted.)

[7] The court further concluded (Pet. App. 39) that "the Commission's reliance on an economic model for computation of the tax component was consistent with regulatory theory and fully justified in light of the specific evidence available."

In rejecting challenges to the use of industry data concerning productivity and gas reserves, the court concluded (Pet. App. 56) that "we cannot hold that, given the context of the FPC's efforts at and program for further analysis and cross-checking, the [industry data] * * * is so devoid of substance that it cannot serve as 'substantial evidence'." With respect to the producers' attack on the Commission's discontinuance of its advance payment program, the court stated (Pet. App. 71): "we find substantial evidence supporting the Commission's conclusion that advance payments were no longer needed." With respect to the Commission's definition of "new gas," the court stated (Pet. App. 91): "[w]e affirm the FPC's determination as supported by substantial evidence and exercise of reasonable discretion." These and other statements in the opinion (see, *e.g.*, Pet. App. 41, 49, 50, 61–62, 65) refute APGA's claim that the court of appeals abandoned the substantial evidence test.

APGA's selective quotation (Pet. 15–19) of statements from the opinion does not demonstrate an abandonment of the substantial evidence test or application of an improper standard of review. Those statements reflect the standard of review that this Court has expressly endorsed with respect to Commission ratemaking in *Permian*, *Mobil*, and other cases. See

Permian, supra, 390 U.S. at 766–767, 790–792; *Mobil, supra,* 417 U.S. at 306–311.[8]

This Court emphasized in *Mobil* (417 U.S. at 309–310) that "application of the * * * criteria of judicial review of Commission orders is primarily the task of the court of appeals." The Court added (*ibid.*) that the "responsibility to assess the record to determine whether agency findings are supported by substantial evidence" is, by virtue of 15 U.S.C. 717r(b), the function of the court of appeals, and that this Court therefore will intervene only in the "rare instance when the standard appears to have been misapprehended or grossly misapplied" by the court of appeals. No such rare instance is presented here.

2. APGA next challenges (Pet. 20–24) the Commission's inclusion in the rates of a component for the producers' federal income tax costs.

In previous rate proceedings the Commission had included income tax costs in its cost models only to offset tax credits accruing to producers (from deduc-

[8] APGA's specific objection (Pet. 16–17) to the court of appeals' references to its reviewing role as a court of equity overlooks the statement of this Court in *Mobil, supra,* 417 U.S. at 311, that the "jurisdiction to review orders of the Commission is vested in a court with equity powers." *Accord, Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364, 373: "[t]he jurisdiction to review the orders * * * is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." See also *Natural Gas Pipeline Company of America* v. *Federal Power Commission,* 128 F. 2d 481, 485–486 (C.A. 7).

tions such as the percentage depletion allowance and intangible drilling expenses); producers whose tax liability exceeded their credits could obtain special relief by proving their net tax liability from their actual tax returns (Pet. App. 31). See *Shell Oil Co., supra,* 520 F. 2d at 1080–1081. That approach was based on the Commission's view that "the tax liability of producers varied widely, thus making averaging extremely unprecise." *Id.* at 1081. However, the Tax Reduction Act of 1975[9] substantially increased the tax liability of producers by, among other things, eliminating the percentage depletion allowance for most producers, effective July 1, 1976, and limiting the use of foreign tax credits on foreign related income (Pet. App. 32). Consequently, the Commission chose in this proceeding to include tax considerations in its cost models in two ways: first, as in previous proceedings, the model reduces the producers' drilling costs by an amount estimated to be the tax savings resulting from the deduction of pre-production expenditures; and second, the model allows a cost of paying income taxes calculated at 48% of profits (*id.* at 30). The allowance of the cost of income taxes at the full statutory rate was based on the conclusion that the Tax Reduction Act had sufficiently reduced the variations in tax liability to make averaging appropriate (Pet. App. 33 and n. 28).

APGA's contention appears to be that the Commission is not permitted, under the substantial evidence

[9] Section 501(a), 89 Stat. 26.

requirement of the Act and decisions of this Court and the courts of appeals, to include a tax cost in the base rate in the absence of specific evidence (*i.e.*, tax returns) demonstrating the actual tax liability of the producers (Pet. No. 20–24).

This contention, which presumably would apply to every cost included in the base rate, would forbid the regulatory approach endorsed by this Court in *Permian* and *Mobil*. As the court of appeals noted (Pet. App. 36), *Permian* and subsequent cases "have approved the use of regional and national averages, which include a hypothetical cost projection for some producers, as a means of arriving at a reasonable individual rate." As the court further stated (*ibid.*), "the key question [is] not the extent to which the Commission methodology consisted of empirical observations, but whether its premises were supported by substantial evidence and whether its reasoning was sound." The thorough analysis by the court of appeals (Pet. App. 29–50) demonstrates that the Commission's premises for including tax costs in the base rate at the full statutory rate were supported by substantial evidence (in particular, the impact of the Tax Reduction Act of 1975 on the tax costs of producers), and that its reasoning (that the 1975 Act would sufficiently reduce variability among producers' tax liabilities to permit averaging) was sound.

The court of appeals correctly rejected APGA's further contention (Pet. 21–22) that the Commission's treatment of income taxes was erroneous under

this Court's decisions in *Federal Power Commission* v. *United Gas Pipe Line*, 386 U.S. 236, and *Federal Power Commission* v. *United Gas Pipe Line Co.*, 393 U.S. 71, as well as decisions of several courts of appeals. Those cases upheld the Commission's decisions in prior ratemaking proceedings to require evidence of actual taxes paid before including producer's rate base any tax liability in excess of tax credits in the prescribed rates. They do not suggest that the Commission, once having selected a methodology, would be precluded from changing its approach. Indeed, the *United Gas Pipe Line* decisions expressly recognize the Commission's broad discretion in deciding how best to treat tax components in its ratemaking methodology (386 U.S. at 246–247; 393 U.S. at 72–73).[10]

APGA also contends, relying on the dissent, that the inclusion of tax costs at the full statutory rate fails to account adequately for the tax savings that some producers might derive by filing consolidated tax returns with non-regulated affiliated companies whose net losses could reduce or eliminate tax liability (Pet. 21–24). That issue was fully considered by the Commission (Opinion 770–A, p. 83) and the court of appeals (Pet. App. 40–42). The Commission found, and

[10] In *Shell Oil Co.*, *supra*, in which the court of appeals upheld the Commission's earlier approach to tax costs, the court issued an opinion on rehearing for the specific purpose of stating that its decision "should in no way be construed to foreclose a *de novo* review of federal income tax in the current biennial review proceeding * * *." 525 F. 2d at 1263.

255-433—78——3

the court agreed, that there was no evidence to support the conclusion that any natural gas producer had realized tax savings by filing consolidated returns with unprofitable non-regulated affiliates (Pet. App. 40–42, 48–49).[11] Neither APGA nor the dissent has cited evidence of such a practice, much less evidence that it would extend beyond isolated instances, and its mere possibility does not preclude the Commission from establishing industry-wide rates on the basis of reasonably expected industry-wide costs.

3. The court below unanimously and correctly rejected APGA's contention (Pet. 24–30) that the Natural Gas Act requires the Commission, in establishing rates, to utilize an evidentiary hearing providing for oral cross-examination by interested parties; that is, the kind of hearing required by 5 U.S.C. 556 and 557. This contention has been rejected by every court of appeals that has considered the matter under

[11] In addition, the court noted that the Commission's approach was supported by the "incredibly difficult task" (Pet. App. 49) of basing jurisdictional tax costs on an historical analysis of actual tax returns. In view of the recent elimination of the percentage depletion allowance, the Commission found that "it is very unlikely that any meaningful historical average tax would be derived" from an analysis of the tax returns (Opinion 770–A, p. 165, J.A. Part I, Vol. II, 657). The court further noted that "it would be well nigh impossible to undertake the task of segregating gas operations from oil operations, operations involving jurisdictional gas from those involving nonjurisdictional gas, associated gas from non-associated gas, and then differentiating between the various vintages of nonassociated jurisdictional gas" (Pet. App. 37).

the Natural Gas Act.[12] It is also inconsistent with this Court's decisions in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–757, and *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224. Those cases held that an evidentiary hearing under 5 U.S.C 556 is required only when the agency's statute expressly prescribes not only that there be a hearing, but also that the determination be made "on the record" (5 U.S.C. 553) or words of equivalent import—and hence that a statutory provision requiring agency action only "after hearing" did not impose such a requirement. Like the statute considered in *Allegheny-Ludlum* and *Florida East Coast R. Co.*, the Natural Gas Act provides that ratemaking shall be "after a hearing" (15 U.S.C. 717d(a)) but contains no requirement that the determination be "on the record," or words of equivalent import.

There is no merit to APGA's contention that Section 19(b) of the Act, 15 U.S.C. 717r(b), making the Commission's finding conclusive if supported by substantial evidence, has the effect of requiring a full evidentiary hearing on the record. The words "substantial evidence" in 15 U.S.C. 717r(b) add nothing to the "after a hearing" language of 15 U.S.C. 717d

[12] *Shell Oil Co.* v. *Federal Power Commission*, 520 F. 2d 1061 (C.A. 5), certiorari denied *sub nom. The California Co.* v. *Federal Power Commission*, 426 U.S. 941; *Mobil Oil Corp.* v. *Federal Power Commission*, 483 F. 2d 1238 (C.A.D.C.); *American Public Gas Association* v. *Federal Power Commission*, 498 F. 2d 718 (C.A.D.C.); *Phillips Petroleum Co.* v. *Federal Power Commission*, 475 F. 2d 842 (C.A. 10), certiorari denied *sub nom. Chevron Oil Co.* v. *Federal Power Commission*, 414 U.S. 1146.

(a), which by itself is insufficient to trigger the formal hearing requirement. *Allegheny-Ludlum Steel Corp., supra,* 406 U.S. at 756–757.[13] Especially when viewed in light of Section 15(b) of the Act, 15 U.S.C. 717n(b), which states that "[n]o informality in any hearings, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation," the language of 15 U.S.C. 717r(b) does not amount to an "on the record" requirement that would invoke the formal procedures of 5 U.S.C. 556 and 557.[14]

Finally, APGA is wrong in relying on *Mobil Oil Corp.* v. *Federal Power Commission,* 483 F. 2d 1238 (C.A.D.C.); *American Public Gas Association* v. *Federal Power Commission,* 498 F. 2d 718 (C.A.D.C.);

[13] APGA is incorrect in suggesting that Section 1.20(g)(1) of the Commission's regulations, 18 C.F.R. 1.20(g)(1), requires a formal evidentiary hearing even if the Natural Gas Act does not (Pet. 26). Section 1.20(g) governs the "presentation by the parties" when, and only if, the Commission determines that a formal hearing is necessary and initiates such a hearing pursuant to Section 1.20(a) (18 C.F.R. 1.20(a)). Section 1.20(m) (18 C.F.R. 1.20(m)) sets forth the procedures to be utilized in rulemaking. Thus Section 1.20 merely allows the Commission to implement its broad authority to tailor procedures to the needs of particular cases, and cannot properly be construed to require the Commission to hold a formal hearing.

[14] Even though the Natural Gas Act does not require such procedures, any future proceedings to establish national ceiling rates for natural gas producers and gatherers "may afford any interested person a reasonable opportunity to submit written questions with respect to disputed issues of fact to other interested persons participating in the rulemaking proceeding" (DOE Act, Section 403(d), 91 Stat. 585). Such procedures are encouraged but not mandated. H.R. Rep. No. 95–539, 95th Cong., 1st Sess. 77 (1977).

American Smelting & Refining Co. v. *Federal Power Commission,* 494 F. 2d 925 (C.A.D.C.), certiorari denied, 419 U.S. 882; and *City of Chicago* v. *Federal Power Commission,* 458 F. 2d 731 (C.A.D.C.), certiorari denied, 405 U.S. 1074. None of those cases held that a full evidentiary hearing with a right to oral cross-examinination is required in Commission ratemaking. *Mobil,* the leading case, stands at most for the proposition that the Natural Gas Act requires somewhat fuller ratemaking procedures than the minimum informal procedures authorized by 5 U.S.C. 553. (But see Section 15(b) of the Act, 15 U.S.C. 717n(b).) As the court below found, the procedures employed in this case—including opportunities for submission of comments and reply comments, for review of other parties' submissions, and for oral arguments—went considerably "beyond the minimum required by Section 553 and satisfy the hearing requirement of the Natural Gas Act" (Pet. App. 100). Those procedures were fully consistent with the decisions cited by petitioners.[15]

[15] Both *American Public Gas Association* and *Mobil* support the use of procedures such as those used in this proceeding. See 498 F. 2d at 722–723; 483 F. 2d at 1258–1260, 1262–1263. See also *American Airlines, Inc.* v. *Civil Aeronautic Board,* 359 F. 2d 624, 632–633 (C.A.D.C.). *City of Chicago, supra,* (458 F. 2d at 743–744) and *American Smelting, supra,* (494 F. 2d at 933) merely require that a hearing be held; they do not specify the procedures that must be followed. *City of Chicago* specifically recognizes "the Commission[s] power to realistically tailor the proceedings to fit the issues before it" (458 F. 2d at 744).

4. Conditional cross-petitioners Amerada Hess Corp., *et al.*, ("Amerada"), producers of natural gas, challenge the definition of "new gas" in Opinion No. 770–A [16] on the ground that they allegedly were given insufficient notice and opportunity to comment on that definition, in asserted violation of 5 U.S.C. 553 and the Fifth Amendment (Pet. No. 77–697, 9–12). The record is otherwise.

First, the order instituting the proceeding (52 F.P.C. 1693) clearly set forth the Commission's intention to engage in a comprehensive review of the rate structure prescribed in Opinion No. 699–H (*id.* at 1694), as well as its intention to "rely on the responses filed in this proceeding as the basis for modifying" that rate structure (*ibid.*).[17] Such a review would nec-

[16] The "new gas" definition in Opinion 770–A is somewhat narrower than the "new gas" definition established by the Commission in previous rate orders, including Opinion 699–H. See Pet. App. 88. Under Opinion 770–A, "new gas" is limited to gas from wells commenced after the cut-off date. Under Opinion 699–H, new gas included, *inter alia*, gas from wells commenced before the cut-off date that was first delivered in interstate commerce after the cut-off date. See Pet. App. 88–89.

[17] The ordering paragraphs demonstrate the broad scope of the proceeding (52 F.P.C. at 1695):

"(A) Proceedings are hereby instituted * * * to prescribe rules and regulations establishing just and reasonable rates for jurisdictional sales of natural gas dedicated to interstate commerce on or after January 1, 1973, for the biennium from January 1, 1975, to and including December 31, 1976, and otherwise regulating such jurisdictional sales on a nationwide basis. * * *

"(B) The proceedings instituted by Ordering Paragraph (A), *supra*, shall encompass an investigation of the facts, conditions, practices, and any other relevant matters pertaining to the sale of natural gas in interstate commerce. * * *"

essarily encompass a review of qualifying criteria for rates established.

Second, as the court below noted (Pet. App. 90), Amerada also had adequate notice from APGA's initial comments, which "recommended that no flowing gas should be entitled to a new rate" (*ibid.*). The court found: "This embraced the possibility of denying the new national rate to gas already flowing to the intrastate market which, because of subsequent contracts, was later dedicated to the interstate market (*ibid.*).[18]

Third, as the court also noted (Pet. App. 88), the criteria for new gas had been "much pondered" by the Commission and extensively debated in the first national rate proceeding. Indeed, the court pointed out that the initial rulemaking notice in the first rate proceeding proposed the same restrictive new gas definition finally adopted in Opinion 770–A, and that the definition became progressively more favorable to producers in the course of that proceeding (Pet. App. 90–91). In these circumstances it is unpersuasive for the producers to contend that they were without notice that the new gas definition was an issue in this proceeding, or that, in the court's words, "the procedure

[18] See APGA's initial comments, J.A. Part III, Vol. I, 348–351. On rehearing the issue was raised by a number of parties: J.A. Part III, Vol. II, 618–622 (Senator James Abourezk, *et al.*); 645–7 (APGA); 757–9 (New York Public Service Commission); 787–8 (Associated Gas Distributors). And Amerada and its supporters sought an expansion of criteria in Opinion No. 770 (*id.* at 720–3). Thus, the issue had been joined prior to oral argument, and Amerada had full notice of it.

previously invoked to their advantage became inherently unfair when now invoked to the advantage, to some degree, of consumers" (*ibid.*).[19]

5. Amerada attacks on various grounds the Commission's decision to establish different rates for different classes, or vintages, of gas depending on the date of commencement of the producing well (Pet. No. 77–697, 13–15). The court of appeals correctly rejected these arguments (Pet. App. 27–29).

Contrary to Amerada's suggestion (Pet. No. 77–697, 13–14), the Commission's rejection in Opinion No. 699–H of a rate structure that would have resulted in multiple vintages, and its move in that decision toward the elimination of vintaging as contracts expired (52 F.P.C. at 1636–1638), did not preclude it from reconsidering the matter. The Commission had employed vintaging in earlier rate cases, including *Permian,* in which this Court considered and approved the approach. (390 U.S. at 795–805). As the court below noted (Pet. App. 28), the dramatic increase in rates and costs between Opinion No. 699–H and the current opinions "justify [a] difference in outlook and response" (*ibid.*). Thus, the Commission was not precluded from changing its former policy but had the authority, "in its balance of interests, to emphasize, as it did here, its 'responsibility to minimize severe and harmful economic dislocation due to increased rates' " (*id.* at 29).

[19] The adequacy of the notice and opportunity to comment answers Amerada's claims under both the Administrative Procedure Act and the Fifth Amendment.

In addition, the court correctly stated that the argument "that natural gas must be regulated as an irreplaceable commodity, not a service," had been "reject[ed] as long ago as the 1968 *Permian* opinion" (*id.* at 27). The court also found that vintaging to prevent windfall profits constituted an appropriate "balancing of the interests of producers and consumers" (*id.* at 27–28).

6. Finally, Amerada raises a number of challenges to the Commission's cost formula (Pet. No. 77–697, 15–20). The court below did not expressly address all these points, stating that it had considered them all but "cannot practically speak separately to each of the issues" (Pet. App. 12).[20] This Court similarly stated in *Permian, supra,* 390 U.S. at 767: "We are not obliged to examine each detail of the Commission's decision; if the 'total effect of the rate order cannot be said to be unjust and reasonable, judicial inquiry under the Act is at an end' " (quoting from *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S.

[20] The court considered at length and upheld the productivity figures used by the Commission in its rate formula, which Amerada attacks (Pet. No. 77–697, 16–18) as failing to account sufficiently for the declining trend in productivity. The court's consideration was in response to numerous claims by *consumers* that the Commission's productivity figures were too low (resulting in cost figures that were too high), because, among other asserted reasons, the figures were based on data supplied by producers that allegedly contained several significant inaccuracies (Pet. App. 50–62). After thoroughly considering these claims, the court concluded that "[i]n the specific circumstances of this proceeding, we find that the Commission's productivity calculation is adequately supported" (Pet. App. 62).

591, 602). The rather technical issues in question here were fully considered in the Commission's opinions (See J.A. Part I, Vol. II. 622–624, 647–648, 682–685), and there is no reason to doubt that the court of appeals reviewed them adequately.

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The Natural Gas Act, 52 Stat. 822, as amended, 15 U.S.C. 717 *et seq.* provides in pertinent part:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as

the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders,

without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; * * * and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hear-

ing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

HEARING; RULES OF PROCEDURE

SEC. 15. (a) Hearings under this Act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearings, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.

REHEARINGS: COURT REVIEW OF ORDERS

* * * * *

SEC. 19 (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that

such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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